A

DATUK HJ WASLI MOHD SAID

v.

PP & ANOTHER CASE

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL HAMID EMBONG J
[CRIMINAL APPLICATIONS NO. 44-23-2006 & 46-6-2004]
31 MARCH 2006

C ***CIVIL PROCEDURE:*** *Jurisdiction - Court - Inherent powers of court - Whether court could act to strike out or stay proceedings in the case of an abuse of its process - Whether application to strike out or have charges stayed dismissed*

D ***CONSTITUTIONAL LAW:*** *Double jeopardy - Issue of - Applicability - Whether charges dissimilar and bore different elements - Whether prosecution need to prove different ingredients to make out charges facing applicant - Whether offences occurred in two separate jurisdictions - Plea in bar of autrefois - Whether argument misplaced - Federal Constitution, art. 7(2) - Criminal Procedure Code, ss. 302 and 303 - Whether*
E *applicable since there has not yet been an acquittal or conviction - Whether applicant placed in jeopardy twice in view of overlapping charges - Whether application to strike out or have charges stayed dismissed*

F ***CRIMINAL PROCEDURE:*** *Prosecution - Propriety of - Mala fide - Allegation of - Whether charges against applicant preferred in bad faith - Federal Constitution, art.145(3) - Whether application to strike out or have charges stayed dismissed*

G ***CRIMINAL PROCEDURE:*** *Charge - Validity - Whether charges remain valid after repeal of Prevention of Corruption Act 1961 - Anti Corruption Act 1997, s. 62(3) - Interpretation Acts 1948 and 1967, ss. 65, 77 - Whether application to strike out or have charges stayed dismissed*

H ***CIVIL PROCEDURE:*** *Parties - Joinder - Application for - Charges against accused persons - Whether there was a nexus between the charges - Whether there was unity of purpose or design in their acts - Whether application disallowed*

I

This judgment was in respect of two separate applications but simultaneously heard since they were closely related. For the sake of convenience, a fused judgment encompassing both applications sufficed. In case no. 44-23-2006, the accused person, Dato' Wasli Mohd Said (WMS) was making an application to either strike out the charges or stay the proceedings against him now pending before this court. WMS was facing corruption charges where he was alleged to have committed an offence under s. 3(b)(ii) Prevention of Corruption Act 1961 at Hotel Fairlane, Kuala Lumpur ('the KL charges'). It was contended that the charges now preferred against WMS were manifestly oppressive, scandalous and was an abuse of the process of the court. Counsel for WMS submitted that the KL charges duplicated the five charges facing WMS in the Kota Kinabalu Sessions Court ('the KK charges'). It was submitted that in essence, all the charges were related to one and the same transaction, the only difference was that the KL charges were related to offers of bribe money made to John Liaw and Michael Emban, which offers were perfected by payments made in Sabah *ie*, the substance of the KK charges. Counsel for the applicant raised these issues: (a) whether the court could act to strike out or stay the proceedings in the case of an abuse of its process; (b) as to the issue of double jeopardy, it was submitted that WMS had been put through a prosecution twice for what in essence was the same offence which amounted to an oppression and whether this court must act to suppress it; (c) the question of *mala fide* on the part of the prosecution in preferring the two KL charges, which it was said was done for an improper purpose, in that the prosecution was getting around the problem it faced in its failure to transfer the KK charges to Kuala Lumpur and (d) whether the KL charges remain valid after the repeal of the Prevention of Corruption Act 1961.

By oral application, the Deputy Public Prosecutor applied for a joint trial of both the accused persons, Tan Sri Kasitah Gaddam (KG) and WMS. KG was faced with two charges. Firstly, that he had taken part in the decision making to approve the sale of 16.8 million shares of Pengerusi Lembaga Kemajuan Tanah Negeri (LKTNS) in SAPI Plantations Sdn Bhd (SAPI) for his own benefit and secondly, that he had cheated the board of LKTNS by concealing PBB Oil Palms Sdn Bhd's (PBB) offer and

influenced the board to approve the sale of those shares to Briskmark Enterprise Sdn Bhd. Both KG and WMS took objections to this application.

Held (dismissing application to strike out charges/stay proceedings and disallowing application for joinder):

(1) The court in exercising its inherent power is in fact exercising a judicial power, in the sense that it hears both sides before determining where the justice of the case lies. Striking out a case, or staying its proceedings is an exercise of this judicial power. This act does not encroach into the parameters of the Public Prosecutor's power of prosecution which was an executive power solely entrusted upon him to act upon the evidence available to him. Once a criminal proceeding is before the court, 'a host of judicial powers will flow to enable it to proceed with the trial and determine the disputes between the parties.' Thus, in exercising its inherent powers on a matter now in dispute before it, it cannot be said that the court is fettering the powers of the Public Prosecutor. In fact, the converse could be read as a restraint to the court's judicial power if the court is now curtailed in the exercise of its general and inherent powers. (paras 10 & 11)

(2) The KL and KK charges facing WMS were dissimilar and bore different elements. It may be that the prosecution, in narrating its case, would have to unfold the same story and that this may involve the same witnesses giving evidence. It may also be that in proving the KK charges, the foundation of the prosecution's case may require it to recount the events touching on the KL charges. However, the reality was that the prosecution would need to prove different ingredients in order to make out the charges of 'giving' and 'offering' now facing WMS. Although there may occur an overlapping of evidence, it could not be said that WMS was vexed with duplicate prosecutions. The offences under the KL and KK charges may be cross-related or even arise out of the same transaction but they are certainly not the same. The acts of offering and giving monies under the respective sections creating those offences stand separately and each act formed a distinct and complete offence. Further, those offences occurred in two separate jurisdictions and need to be tendered

in separate courts. There was no serious prejudice or unfairness occurring from this arrangement to the extent that WMS would be deprived of a fair trial. (paras 16)

(3) On the plea in bar of *autrefois*, this argument was misplaced. This doctrine is now codified in our laws under art. 7(2) of our Constitution and in s. 302 and s. 303 of the Criminal Procedure Code. It was not applicable to the situation faced by WMS since there had not yet been an acquittal or conviction. Thus it could not be said that WMS was placed in jeopardy twice in view of the overlapping KL and KK charges. He could not also be said to be in the peril of being punished twice for the same offence, since he was charged with separate offences. (para 18)

(4) There was no merit to say that the KL charges against WMS were preferred in bad faith and for an improper purpose. This court accepted the explanation of the Deputy Public Prosecutor that these KL charges were then in a period of gestation. The delay was satisfactorily explained, although this court held that even if not clarified, this alone could not amount to a *prima facie mala fide* act, for into that phrase 'exercisable at his discretion', as found under art. 145(3) Federal Constitution, should read in this court's view, the power to prefer whatever charges and at whatever time he chooses. The court's inherent power could not be invoked to override that express provision of the law. (para 24)

(5) This court agreed with the Deputy Public Prosecutor's submission that the offences were committed on 22 October 1996 and as such the provisions of the 1961 Act was applicable since they were operative until 8 January 1998 when the Anti Corruption Act 1997 ('the 1997 Act') took effect. The Deputy Public Prosecutor contended that s. 62(3) of the 1997 Act was clear in its intention in that the procedure and evidence of the 1997 Act may be used against WMS either for pending investigations or court proceedings. Further, Part II of the Interpretation Acts 1948 and 1967 (Act 388) in view of ss. 65 and 77 (on repeal, saving and its effect) were applicable to the institution of this prosecution under the 1961 Act even though the complaint against him was made in 1999. The repeal of the 1961 Act under s. 61 of the 1997 Act, did not in any way take away the Public Prosecutor's

powers to institute these charges. For these reasons, the application by WMS to either strike out or have the KL charges stayed was dismissed. (paras 27 & 28)

(6) This court was not convinced that the prosecution had shown as they were dutybound to prove that the criteria of unity of purpose or design and continuity of action of both the accused persons were present in the charges. KG faced two charges where he had taken part in the decision making to approve the sale of the shares of LKTNS in SAPI for his own benefit and cheating the board of LKTNS by concealing PBB's offer and influencing the board to approve the sale of those shares to Briskmark. WMS faced two charges of bribing John Liaw and Michael Emban. On the face of these charges alone, this court was doubtful that there was a nexus between them or that there was a unity of purpose or design in their acts. It was in the interest of justice that this court disallowed this application for joinder. (para 39)

Case(s) referred to:

Babulal Choukhani v. Emperor 39 CLJ 1938 ***(refd)***
Chin Choy v. PP [1955] 21 MLJ 237 ***(refd)***
Connelly v. DPP [1964] AC 1254 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 MLJ 208 ***(refd)***
Jayaraman v. PP [1979] 2 MLJ 88 ***(refd)***
Johnson Tan Han Seng v. PP [1977] 2 MLJ 66 ***(refd)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***
Loh Shak Mow v. PP [1987] 1 MLJ 362 ***(refd)***
Maxwell v. R [1996] 1 LRC 299 ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
PP v. Jorge Enrique Pellon Tellon [1998] 1 CLJ Supp 118 HC ***(refd)***
PP v. Loh Ang Sing [1979] 2 MLJ 129 ***(refd)***
R v. Pearce [2000] 1 LRC 338 ***(refd)***
Reg v. Humphrys [1977] AC 1 ***(refd)***
Rex v. A Govindasamy and Koh Hak Beng [1935] Vol IV MLJ 23 ***(refd)***
SA Jamil Md Yusof v. PP [2002] 6 CLJ 132 HC ***(refd)***
Saravanan KS Somu v. Timbalan Menteri Dalam Negeri [2005] 1 CLJ 336 HC ***(refd)***
Yeap Seok Pen v. Government Of The State Of Kelantan [1986] 1 MLJ 449 ***(refd)***

Legislation referred to:
Anti Corruption Act 1997, ss. 10(b)(aa), 45(7)(b), 61, 62(3)
Criminal Procedure Code, ss. 170, 302, 303, 376(1)
Federal Constitution, arts. 7(2), 145(3)
Interpretation Acts 1948 and 1967, ss. 65, 77
Prevention of Corruption Act 1961, ss. 3(b)(ii), 15

For the applicant - Gobind Singh Deo; M/s Karpal Singh & Co
For the respondent/PP - Mohd Hanafiah Zakaria DPP (Azmi Ariffin, Hamidun Hj Abdul Fatah, Masri Mohd Daud & Choong Loong Men with him)
For the respondent - Shafee Abdullah; M/s Shafee & Co
Ida Fazlina Jamros watching brief for Perlis Plantation Bhd

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Hamid Embong J:

[1] This judgment is in respect of two separate applications but simultaneously heard since they are closely related. For the sake of convenience, I feel that a fused judgment encompassing both applications will suffice.

Application By Dato' Wasli Mohd Said

[2] In case No. 44-23-2006, the accused person, Dato' Wasli bin Mohd Said (WMS) is making an application to either strike out the charges or stay the proceedings against him now pending before this court. WMS is facing the following two charges:

> 1. Bahawa kamu pada 22 Oktober 1996 jam di antara 10.20 pagi hingga 10.30 pagi bertempat di Hotel Fairlane di Jalan Walter Grenier, 55100, di dalam Wilayah Persekutuan Kuala Lumpur, secara rasuah telah menawarkan satu suapan wang sebanyak RM500,000.00 kepada John Liaw Chee Shing, seorang penjawat awam, iaitu Ahli Lembaga Pengarah Kemajuan Tanah Negeri Sabah (LKTNS), sebagai dorongan untuk John Liaw Chee Shing menyokong meluluskan pembelian saham Lembaga Kemajuan Tanah Negeri Sabah dalam Sapi Plantations Sdn. Bhd. oleh Syarikat Briskmark Enterprise Sdn Bhd dalam mesyuarat Ahli Lembaga Pengarah Lembaga Kemajuan Tanah Negeri Sabah Ke 3/96 dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 3(b)(ii) Akta Pencegah Rasuah 1961 dan boleh dihukum di bawah Seksyen 3 Akta yang sama.

A 2. Bahawa kamu pada 22 Oktober 1996 jam di antara 9.40 pagi hingga 10.30 pagi bertempat di Hotel Fairlane di Jalan Walter Grenier, 55100, di dalam Wilayah Persekutuan Kuala Lumpur, secara rasuah telah menawarkan satu suapan wang sebanyak RM500,000.00 kepada Michael Emban, seorang penjawat awam, iaitu Ahli Lembaga Pengarah Kemajuan Tanah Negeri Sabah (LKTNS), sebagai dorongan untuk Michael Emban bersetuju dalam mesyuarat Ahli Lembaga Kemajuan Tanah Negeri Sabah ke 3/96 dengan cadangan penjualan saham Lembaga Kemajuan Tanah Negeri Sabah dalam Sapi Plantations Sdn. Bhd. oleh Syarikat Briskmark Enterprise Sdn Bhd dan dengan itu kamu telah melalukan satu kesalahan di bawah Seksyen 3(b)(ii) Akta Pencegah Rasuah 1961 dan boleh dihukum di bawah Seksyen 3 Akta yang sama.

[3] The grounds for this application is as found in the notice of motion filed by WMS and may be discussed under the following heads:

Can The Court Act To Strike Out Or Stay The Proceedings In The Case Of An Abuse Of Its Process?

[4] It was contended that the charges now preferred against WMS are manifestly oppressive, scandalous and so, an abuse of the process of court. Mr. Gobind Singh Deo of counsel for WMS submitted that the KL charges duplicate the five charges facing WMS in the Kota Kinabalu Sessions Court (the KK charges) which are:

1. Bahawa kamu di antara Mac 1997 dan Mei 1997 bertempat di Pejabat Lembaga Kemajuan Tanah Negeri Sabah yang beralamat di Jalan Kelapa Sawit, Off KM 4 Jalan Tuaran, 88300 Kota Kinabalu, di dalam Negeri Sabah, secara rasuah telah memberi satu suapan iaitu wang tunai sebanyak RM100,000.00 kepada John Liaw Chee Shing sebagai upah untuk John Liaw Chee Shing menyokong meluluskan pembelian saham Lembaga Kemajuan Tanah Negeri Sabah dalam Sapi Plantations Sdn. Bhd. oleh Syarikat Briskmark Enterprise Sdn Bhd dalam mesyuarat Ahli Lembaga Pengarah Lembaga Kemajuan Tanah Negeri Sabah (KTNS) pada 22 Oktober 1996 dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 3(b)(i) Akta Pencegah Rasuah 1961 dan boleh dihukum di bawah Seksyen 3 Akta yang sama.

2. Bahawa kamu pada awal tahun 1998 bertempat di Pejabat Lembaga Kemajuan Tanah Negeri Sabah yang beralamat di Jalan Kelapa Sawit, Off Km 4 Jalan Tuaran, 88300 Kota Kinabalu, di dalam Negeri Sabah, secara rasuah telah memberi satu suapan iaitu wang tunai sebanyak RM400,000.00 kepada John Liaw Chee Shing sebagai upah untuk John Liaw Chee Shing menyokong meluluskan pembelian saham Lembaga Kemajuan Tanah Negeri Sabah dalam Sapi Plantations Sdn. Bhd. oleh Syarikat Briskmark Enterprise Sdn Bhd dalam mesyuarat Ahli Lembaga Pengarah Lembaga Kemajuan Tanah Negeri Sabah pada 22 Oktober 1996 dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 10(b)(aa) Akta Pencegah Rasuah 1997 dan boleh dihukum di bawah Seksyen 16 Akta yang sama.

3. Bahawa kamu di antara akhir tahun 1997 dan awal tahun 1998 bertempat di Pejabat Lembaga Kemajuan Tanah Negeri Sabah yang beralamat di Jalan Kelapa Sawit, Off Km 4 Jalan Tuaran, 88300 Kota Kinabalu, di dalam Negeri Sabah, secara rasuah telah memberi satu suapan iaitu wang tunai sebanyak RM100,000.00 kepada Michael Emban sebagai upah untuk Michael Emban menyokong meluluskan pembelian saham Lembaga Kemajuan Tanah Negeri Sabah dalam Sapi Plantations Sdn. Bhd. oleh Syarikat Briskmark Enterprise Sdn Bhd dalam mesyuarat Ahli Lembaga Pengarah Lembaga Kemajuan Tanah Negeri Sabah pada 22 Oktober 1996 dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 10(b)(aa) Akta Pencegah Rasuah 1997 dan boleh dihukum di bawah Seksyen 16 Akta yang sama.

4. Bahawa kamu dalam bulan Jun 1998 bertempat di Pejabat Lembaga Kemajuan Tanah Negeri Sabah yang beralamat di Jalan Kelapa Sawit, Off Km 4 Jalan Tuaran, 88300 Kota Kinabalu, di dalam Negeri Sabah, secara rasuah telah memberi satu suapan iaitu wang tunai sebanyak RM400,000.00 kepada Michael Emban sebagai upah untuk Michael Emban menyokong meluluskan pembelian saham Lembaga Kemajuan Tanah Negeri Sabah dalam Sapi Plantations Sdn. Bhd. oleh Syarikat Briskmark Enterprise Sdn Bhd dalam mesyuarat Ahli Lembaga Pengarah Lembaga Kemajuan Tanah Negeri Sabah pada 22 Oktober 1996 dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 10(b)(aa) Akta Pencegah Rasuah 1997 dan boleh dihukum di bawah Seksyen 16 Akta yang sama.

5. Bahawa kamu di antara November 1996 hingga 25 Ogos 1997 bertempat di Pejabat Lembaga kemajuan Tanah Negeri Sabah yang beralamat di Jalan Kelapa Sawit, Off Km 4 Jalan Tuaran, 88300 Kota Kinabalu, di dalam Negeri Sabah, secara rasuah telah memberi satu suapan iaitu 3.36 juta saham Sapi Plantations Sdn. Bhd. kepada Tan Sri Kasitah Gaddam sebagai upah untuk

A menyokong meluluskan pembelian saham Lembaga Kemajuan Tanah Negeri Sabah dalam Sapi Plantations Sdn. Bhd. oleh Syarikat Briskmark Enterprise Sdn Bhd dalam mesyuarat Ahli Lembaga Pengarah Lembaga Kemajuan Tanah Negeri Sabah pada 22 Oktober 1996 dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 3(b)(i) Akta Pencegah Rasuah 1961 dan boleh dihukum di bawah Seksyen 3 Akta yang sama.

[5] Learned counsel submitted that in essence, all the charges relate to one and the same transaction, the only difference is that the KL charges relate to offers made to John Liaw and Michael Emban, which offers were perfected by payments made in Sabah, ie, the substance of the KK charges. Learned counsel urged this court to exercise its inherent powers (citing *Connelly v. DPP* [1964] AC 1254) to either strike out or alternatively stay the proceedings on the KL charges on the abuse of process ground. The case of *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 was referred to and in particular this passage:

> in the case of obvious abuses or other forms of material defects, it cannot be said that the High Court does not possess the powers to do the right and undo wrong in the course of administration.

to support the proposition that this court may exercise its inherent power to strike down any abuse of its process. Also, the following passage from *Dato' Seri Anwar bin Ibrahim v. PP* [2002] 3 MLJ 208 where the Federal Court stated:

> While we agree that the court should not be impotent when it comes to abuse of its process and should intervene, if need be, we say that it depends on the circumstances of a particular case. The learned counsel cited the case of *Hui Chi-Ming v. R* [1991] 3 All ER 897 to support his submission on abuse of process. We agree with the doctrine of abuse of process as did the Court of Appeal, but we have to reiterate here that the application of the doctrine will depend on the facts of a particular case and the laws applicable ...

[6] A passage from the speech of Lord Salmon in *Reg v. Humphrys* [1977] AC 1, 46 was also cited in support. His Lordship stated:

> I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred.

[7] It can be seen from the above cited passages that intervention of the court in instances of abuse of process will very much depend on the circumstances of each particular case. To find that an abuse of process arising from the institution of a prosecution would be rare indeed because this court will, without exception, make a legal presumption that all prosecutions instituted by the public prosecutor in the exercise of its powers under art. 145 of the Federal Constitution and read with s. 376(1) of the Criminal Procedure Code are undertaken with the utmost good faith. It falls upon the applicant here to prove on the balance of probabilities that *mala fide's* on the part of the public prosecutor. This aspect was probably also on the mind of Lord Salmon when he expressed in his speech above the observation that "Fortunately, such prosecutions are hardly even brought".

[8] Viscount Dilhorne in the same case took a more cautious and narrow approach when he said:

> Where an indictment has been properly preferred in accordance with the provisions of that Act (Administration of Justice (Miscellaneous Provisions) Act 1933), has a judge power to quash it and to decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognize the existence of such a degree of omnipotence is, as my noble and learned friend Lord Edmund-Davies has said, unacceptable in any country acknowledging the rule of law. But saying this does not mean that there is not a general power to control the procedure of a court so as to avoid unfairness ...

> It does not appear to me to have been necessary in *Connelly v. Director of Public Prosecutions* to decide whether a judge had a power to stop any prosecution in limine, and while I recognize that some of the speeches contained observations of a very general and far-reaching character, I cannot see any reason for thinking that any members of the House would have held that a judge could, in his discretion, prevent the trial of a person for perjury after the alleged perjury had secured his acquittal on the ground that in the judge's view as a matter of policy the prosecution should not have been brought, was unfair, oppressive and an abuse of process.

[9] Learned Deputy Public Prosecutor took the stand that the power of the Attorney General (acting as the public prosecutor) to institute conduct or discontinue any proceedings for any offence as stated in art. 145(3) of the Federal Constitution is unfettered and cannot be challenged. It should not therefore be subservient to the common law concept of the inherent power of the court. Counsel for WMS earlier contended that such powers are not without limit, reading in support this passage from *PP v. Jorge Enrique Pellon Tellon* [1998] 1 CLJ Supp. 118:

> The PP shall have power exercisable at his discretion to institute, conduct or discontinue any proceeding, for an offence based on evidence that he has had upon investigation, but once the case comes to court, the power of the PP ceases and immediately the court is seized with jurisdiction to try the case in accordance with the time-honoured rules of procedure and rules of evidence.

[10] The court in exercising its inherent power is in fact exercising a judicial power, in the sense that it hears both sides before determining where the justice of the case lies. Striking out a case, or staying its proceedings is an exercise of this judicial power. In my view this act does not encroach into the parameters of the public prosecutor's power of prosecution which is an executive power solely entrusted upon him to act upon the evidence available to him. Once a criminal proceeding is before the court, "a host of judicial powers will flow to enable it to proceed with the trial and determine the disputes between the parties." (per Mohd Azmi SCJ in *PP v. Dato Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284). I can do no better than to apply the following passage to answer the issue of whether this court may exercise its inherent power to strike out a case if it found an instance of abuse of process:

> Criminal proceedings are in fact not instituted until the Court has taken cognizance of the offence or offences under one or other of the clauses of sub-section (i) of s. 128 CPC (see *Sohoni Criminal Procedure Code*, 18th Edn., Vol. 3, p. 1885). Accordingly, once a Court is seised with jurisdiction by taking cognizance of any offence under s. 128 CPC, a host of judicial powers will flow to enable the Court to proceed to trial and determine the dispute between the parties in accordance with law. In general, the Court taking cognizance of the offence, is the dividing line between the sphere and domain of the executive and the judiciary, for cognizance by the Court signals the submission of the executive to the jurisdiction of the Court and marks the completion of the exercise of executive power to "institute" the criminal proceedings. From then on, the whole conduct of the proceedings should be within the exclusive judicial power of the Court until its conclusion. The question is, to what extent the provision of Article 145(3) has altered the general rule? That Article refers to "power ... to institute, conduct or discontinue any proceedings for an offence ..." exercisable at the discretion of the Attorney-General, who by virtue of s. 376(i) CPC is also the Public Prosecutor. Since judicial power of the Federation is vested in the Courts, I am of the view that it is manifestly clear the power referred to in Article 145(3) must only relate to the prosecution and not the trial of criminal proceedings. Any other interpretation would make a mockery of the well established concept of judicial independence to determine disputes.

[11] Thus, in exercising its inherent powers on a matter now in dispute before it, it cannot be said that the court is fettering the powers of the public prosecutor. In fact the converse could be read as a restraint to the court's judicial power if the court is now curtailed in the exercise of its general and inherent powers. The position that I would adopt here is similar as was expressed in the Australian High Court in *Maxwell v. R* [1996] 1 LRC 299:

> Our courts do not purport to exercise control over the institution or continuation of criminal proceedings, save where it is necessary to do so to prevent abuse of process or to ensure a fair trial.

Double Jeopardy

[12] Learned counsel next touched on the issue of double jeopardy besetting his client. He complained that WMS has been put through a prosecution twice for what in essence is the same offence. This, he said amounted to an oppression and that this

court must act to suppress it and thus prevent an abuse of its process citing the Australian High Court decision of *R v. Pearce* [2000] 1 LRC 338 where it was held that:

> It should also be accepted that the inclusion of separate counts for what in substance, if not entirely in form, is the same offence may be an abuse of process.

[13] In *R v. Pearce*, the appellant pleaded guilty to two charges of entering a dwelling house and inflicting grievous bodily harm, both counts arising from a single episode and was imposed two separate sentences. The Court of Appeal had held that there was neither double jeopardy nor double punishment. In the High Court it was held, *inter alia*, that:

> The availability of a plea in bar of autrefois acquit or autrefois convict was confined to cases where the elements of the offences were identical or in which all of the elements of one offence were wholly included in the other.

[14] Learned counsel contended that WMS has been severely oppressed and prejudiced by the prosecution's act of preferring these two KL charges over and above the KK charges. It was argued that the KK charges relate to the payments of monies made to John Liaw and Michael Emban and the KL charges relate to the offers for those payments. These charges, both in Kuala Lumpur and Kota Kinabalu thus involve the same elements and further, the KK charges include all the elements required to be proved in the KL charges. Learned counsel submitted that the offences under which WMS are charged with under either s. 3(b)(ii) Prevention of Corruption Act 1961 (Act 57) (respect of the KL charges) or its equivalent s. 10(b)(aa) of the Anti-Corruption Act 1997 (Act 575) (in respect of three of the KK charges), involve only a singular transaction and be impossible to separate. Section 3(b)(ii) Act 57 and s. 10(b)(aa) Act 575 state that:

> Any person who ...
>
> (b) corruptly give, promise or offer to any person whether for the benefit of that person or another person,
>
> Any gratification as an inducement to or reward for ... shall be guilty of an offence ...

[15] It was submitted that the legislative intent of the use of the word 'or' in these sections can only mean that one can only be charged for either one of the elements mentioned or not for all. The learned deputy replied that the elements mentioned in these sections are in respect of different and separate acts. In my view, this is correct. The elements of corruption mentioned there give rise to dissimilar and distinct acts and can be the subject of separate charges. Learned counsel for WMS next submitted that the acts of offering and subsequently paying are so intermingled, they relate to the same transaction which proof would turn upon the testimonies of the same witnesses. Thus the conduct of the prosecution in formulating separate charges at different fora is not in accord with the rule of fairness or is seriously oppressive; and as such amounts to an abuse of process.

[16] Having scrutinised the charges facing WMS, it is my finding that they are dissimilar and bearing different elements. It may be that the prosecution in narrating its case would have to unfold the same story and that this may involve the same witnesses giving evidence. It may also be that in proving the KK charges, the foundation of the prosecution's case may require it to recount the events touching on the KL charges. However, the reality is that the prosecution will need to prove different ingredients in order to make out the charges of "giving" and "offering" now facing WMS. Although there may occur an overlapping of evidence, it cannot be said that WMS is vexed with duplicate prosecutions. The offences under the KL and KK charges may be cross-related or even arise out of the same transaction but they are certainly not the same. This case is unlike the situation in *Connelly v. Director Of Public Prosecution* [1964] AC 1254 where the court intervened using its "residual discretion to prevent anything which savours of abuse of process" on the ground that the defendant there was prosecuted more than once for what is in effect the same offence. In my view the acts of offering and giving monies under the respective sections creating those offences stand separately and each act forms a distinct land complete offence. Further, those offences occur in two separate jurisdictions and need to be tendered in separate courts. I could forsee the inconvenience and hardship faced by WMS in the preparation of his defence, but this is no reason to say that he has been oppressed. Also I could not see any serious prejudice or unfairness occurring from this arrangement to the extent that WMS would be deprived of a fair trial.

[17] On the contrary, he would be at an advantageous position in preparing his defence at the subsequent trial, in the sense that the prosecution would have, during the first trial, imparted some of its evidence.

[18] On the plea in bar of *autrefois*, this argument is in my view misplaced. This doctrine which is now codified in our laws under art. 7(2) of our Constitution and in s. 302 and s. 303 of the Criminal Procedure Code. In my view it is not applicable to the situation faced by WMS since there has not yet been an acquittal or conviction. Thus it cannot be said that WMS is placed in jeopardy twice in view of the overlapping KL and KK charges. (See *Saravanan a/l K S Somu v. Timbalan Menteri Dalam Negeri* [2005] 1 CLJ 336). He cannot also be said to be in the peril of being punished twice for the same offence, since he is charged with separate offences.

Mala Fide

[19] The other point raised by learned counsel for the applicant was the question of *mala fide* on the part of the prosecution in preferring these two KL charges, which it was said was done for an improper purpose, in that the prosecution was getting around the problem it faced in its failure to transfer the KK charges to Kuala Lumpur after the Court of Appeal had dismissed the prosecution's application for the transfer. WMS stated in his supporting affidavit that these KL charges were proferred at the last minute and after two years of the KK charges in the hope that they may be tried together with the charges against Tan Sri Kasitah Gaddam. This unreasonable delay would certainly deprive him of a fair trial, and smacks of *mala fides* on the part of the prosecution.

[20] The learned deputy in his reply referred to the case of *Yeap Seok Pen v. Government Of The State Of Kelantan* [1986] 1 MLJ 449, in particular to this passage of the advice of the Privy Council, which principle I now apply:

> He who asserts bad faith has the burden of proving it, mere suspicion is not enough. In deciding whether the burden is discharged, the court will consider all the evidence before it, including any explanation given by the Minister and any inference to be drawn from the failure to give an explanation. Their Lordships can see no reason to suppose that this was not the approach adopted in the Federal Court.

[21] The learned deputy then adverted to his affidavit in reply which stated that these two KL charges against WMS were then anticipated but put on hold to await the outcome of the prosecution's application to have the KK charges transferred. However the prosecution did not succeed in effecting a transfer because of the lack of jurisdiction of the Kuala Lumpur high court to hear the KK charges. The learned deputy denied any *mala fides* on the part of the prosecution and submitted that it had acted in good faith under the powers conferred upon the Public Prosecutor pursuant to art. 145 Federal Constitution and s. 376 CPC and referred to this passage from the Court of Appeal's judgment in the case of *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [2000] 2 MLJ at p. 499:

> In our view therefore, the question of oppression or vexatiousness on the part of the Attorney General by mounting a prosecution against the appellant for offences under Ordinance 22 does not arise. The Federal Constitution gives the Attorney General the power exercisable at his discretion 'to institute, conduct or discontinue any proceedings for an offence' in any court other than Syariah court, native court or a court-martial.
>
> Article 145(3) reads:
>
> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.
>
> True the Attorney General may institute criminal prosecution at his discretion, the learned counsel for the appellant submitted that the discretion can never be unfettered. However Abdul Hamid Omar LP (as he then was) delivering the judgment of the Federal Court in the case of *Karpal Singh & Anor v. PP* [1991] 2 MLJ 544 at p 548D-A had this to say:
>
> Perhaps it is appropriate that we now pause to consider the constitutional consequences of relying on the English common law concept. Unlike UK, the Constitution of the Federation which is a written law is specifically declared to be the supreme law of the land. Also, it is to be noted that UK has no criminal procedure code as enacted by our legislature. For our immediate purpose we wish to refer to art. 145(3) of the Constitution which states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before Syariah Court, etc... The discretion vested in the Attorney General is unfettered and

A cannot be challenged and substituted by that of the court's. The reasoning and logic behind such contention is well illustrated in the cases of *PP v. Lee Tin Bau* [1985] 1 MLJ 388, *Long bin Samat & Ors v. PP* [1974] 2 MLJ 152, *PP v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 and *Poh Cho Ching v. PP* [1982] 1 MLJ 86. In the circumstances, it is superfluous to reiterate the same points.

[22] As I have said earlier on in this judgment, the powers of the public prosecutor in initiating prosecutions must be presumed to have been exercised in good faith. Unless there are strong and compelling reasons to say otherwise, this court will not willy-nilly question the exercise of that discretion which it must regard as having been performed with honesty and impartiality in the public interest. As was said by Suffian LP in *Johnson Tan Han Seng v. Public Prosecutor* [1977] 2 MLJ 66:

> ... our Attorney General is permitted to take into account the public interest when deciding what charge or charges to prefer against an accused.

[23] And the Lord President further added:

> As we stated then, anybody who has a complaint against the Attorney-General for exercising his discretion in any particular way should direct it not to the courts but elsewhere.

[24] In my view there is no merit here to say that the KL charges against WMS were preferred in bad faith and for an improper purpose. I accepted the explanation of the learned deputy public prosecutor that these KL charges were then in a period of gestation, waiting to be born, so to speak. The delay was satisfactorily explained, although I would hold that even if not clarified, this alone could not amount to a *prima facie mala fide* act, for into that phrase, "exercisable at his discretion" as found under art. 145(3) Federal Constitution, should read in my view, the power to prefer whatever charges and at whatever time he chooses. In this respect I would hold that the court's inherent power cannot be invoked to override that express provision of the law (see *Karpal Singh v. PP* [1991] 2 MLJ 549).

Whether The KL Charges Remain Valid After The Repeal Of The Prevention Of Corruption Act 1961

[25] WMS next questioned the validity of the two KL charges against him on the ground that s. 61 of the Anti Corruption Act 1997 (1997 Act) had repealed the Prevention of Corruption Act

1961 (1961 Act) without preserving the right to prosecute under the 1961 Act as was done when certain other statutes are amended, giving as examples the Securities Industry Act 1983, the Dangerous Drugs (Special Preventive Measures) Act 1985, the Arms Act 1960, and the Commodities Trading Act 1985 where one can be prosecuted for offences committed under the repealed act and legal proceedings may be continued. As such the prosecution has no accrued rights to institute these charges and thus they should be struck out. Section 62(3) 1997 Act states that:

> 62(3) The provisions of this Act which relate solely to procedure or evidence shall apply to any offence against the laws repealed under section 61 and such provisions may be used in the course of any pending investigations and in any court proceedings instituted before or after the commencement of this Act in respect of such offence.

[26] Learned counsel stated that since the first information report against WMS was lodged in 1999, s. 62 ACA 1997 thus could not be applicable to him as there were no pending investigations against him under the 1961 Act. Also, the provisions of the s. 62(3) had taken away valuable evidential and procedural rights accrued to WMS under the 1961 Act citing in comparison and as an example, s. 15 of the 1961 Act with s. 45 1997 Act. Under the former section counsel submitted, his client had a right to remain silent during investigations and the court could not draw any adverse inference from it, whereas under the latter section the court may draw an adverse inference if he chose to remain silent (see s. 45(7)(b)).

[27] The learned DPP submitted that the offences were committed on 22 October 1996 and as such the provisions of the 1961 Act is applicable since they are operative until 8 January 1998 when the 1997 Act took effect. The learned deputy contended that s. 62(3) of the 1997 Act is clear in its intention in that the procedure and evidence of the 1997 Act may be used against WMS either for pending investigations or court proceedings. Further, Part II of the Interpretation Acts 1948 and 1967 (Act 388) in view of ss. 65 and 77 (on repeal, saving and its effect) are applicable to the institution of this prosecution under the 1961 Act even though the complaint against him was made in 1999. I agree with the learned deputy. The repeal of the 1961 Act under s. 61 of the 1997, in my view does not in any way

take away the public prosecutor's powers to institute these charges. The short answer to this issue lies in s. 77 of Act 388 which states:

> 77. Effect of repeal.
>
> Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not:
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed; or
>
> (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

[28] For these reasons, the application by WMS to either strike out or have the KL charges stayed is dismissed.

Application By The Public Prosecutor For A Joint Trial

[29] By oral application, the learned deputy public prosecutor applied for a joint trial of both the accused persons, Tan Sri Kasitah Gaddam (KG) and WMS. KG is facing the following two charges before this court:

> Bahawa kamu pada 22 Oktober 1996, di Bilik Mesyuarat Forum, Fairlane Hotel, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang penjawat awam, iaitu Pengerusi Lembaga Kemajuan Tanah Negeri Sabah (LKTNS), telah melakukan perbuatan rasuah dengan menggunakan kedudukan kamu sebagai Pengerusi LKTNS untuk faedah kewangan kamu, iaitu kamu telah mengambil bahagian dalam membuat keputusan meluluskan cadangan penjualan 16.8 juta saham LKTNS di dalam SAPI Plantations Sdn. Bhd. kepada Briskmark Enterprise Sdn. Bhd. yang mana kamu telah dijanjikan sejumlah 3.36 juta saham dalam SAP Plantations Sdn. Bhd. tersebut dan dengan demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 2(1) Ordinan No. 22 (Kuasa-Kuasa Perlu) Dharurat Tahun 1970.

Bahawa kamu pada 22hb Oktober 1996, di Bilik Mesyuarat Forum, Fairlane Hotel, di dalam Wilayah Persekutuan Kuala Lumpur, telah menipu ahli-ahli mesyuarat Lembaga Kemajuan Tanah Negeri Sabah (LKTNS), iaitu dengan secara curangnya menyembunyikan tawaran PPB Oil Palms Sdn. Bhd. bagi 1 satu saham SAPI Plantations Sdn. Bhd. di dalam cadangan PPB Oil Palms Sdn. Bhd. untuk disenaraikan di papan utama Bursa Saham Kuala Lumpur, dan dengan itu telah dengan sengaja mendorong ahli-ahli mesyuarat LKTNS untuk meluluskan penjualan 16.8 juta saham LKTNS dalam SAPI Plantations Sdn. Bhd. kepada Briskmark Enterprise Sdn. Bhd. yang mana sekiranya mereka diberitahu mengenai tawaran itu, mereka tidak akan meluluskan penjualan saham tersebut dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 417 Kanun Keseksaan.

[30] Both KG and WMS took objections to this application. Both sides had referred me to the test as expressed in *Jayaraman v. PP* [1979] 2 MLJ 88 required before the court may order for more than one accused persons to be jointly tried, which is that:

Where several accused persons committed the same offence or several offences of the same kind or different offences in the same transaction, then all the accused persons can be charged with committing all the offences at the same trial. Here again there is no limit to the number of charges: section 170 CPC.

[31] In determining whether two or more acts constitute the same transaction, the court will look at the circumstances surrounding the charges to ascertain if they meet the following yardsticks, *viz*:

(i) Proximity of time – all the offences were alleged to have been committed at the same time;

(ii) Unity or proximity of place – all the offences were alleged to have been committed at the same place;

(iii) Continuity of action – all the offences are the same and committed at the same time and place; and

(iv) Unity of purpose or design – both accused are charged with having committed all the offences for a common purpose or design.

[32] Learned counsel for both KG and WMS took the common stand that the offences are entirely separate and distinct and at the very most according to learned counsel of WMS, only the criteria of proximity of time and place could be discerned from the charges. But that does not mean that they arose from the same transaction. It was forcefully argued that there was no nexus to connect the charges under the limbs of continuity of action and unity of purpose and design citing as authorities the cases of *Rex v. A. Govindasamy* and *Koh Hak Beng* [1935] Vol. IV MLJ 23 where Terrell J held that:

> Offences are not related merely because they have been committed on the same day or in the same town, or with respect to the same person. In other words there must be a 'nexus', there must be some intention common to both offences which connects them together and enables the Court to hold that they have been committed in the same transaction.

and *Babulal Choukhani v. Emperor* 39 CLJ [1938] p. 452.

[33] The learned deputy urged this court to look at the charges to determine the need for a joinder and agreed that the main test applicable is the unity of purpose and design which is linked to motive, citing *S.A. Jamil bin Md Yusof v. PP* [2002] 7 CLJ 132.

[34] In *Public Prosecutor v. Loh Ang Sing* [1979] 2 MLJ 129, it was held that:

> Whether particular acts are so connected as to form part of the same transaction is a question which has to be decided according to the facts in each particular case. (See *Mallal's Criminal Procedure*, 4th Edn. P. 246).

[35] Lee Hun Hoe JC in that case with whom I agree, also stated that:

> If the prosecution wishes to apply for joint trial it is for the prosecution to justify it. The prosecution has all the facts and should have little difficulty in making out a good case for a joint trial. Even though an offence or offences are committed in the same transaction it is still a matter for the presiding magistrate to decide whether accused should be tried together or separately. How he is going to exercise his discretion must necessarily depend on the facts of each case. The discretion must of course be exercised judiciously.

[36] It is correct to say that a joinder of these trials would save judicial time, cost and avoid multiplicity of trials. The material for this court's reference up to now are only the respective charges against KG and WMS. Based on these charges this court will now need to decide whether there are valid reasons for a joinder. Once the trials are concluded it would be too late to determine whether this was a proper joinder or not. It must be said that although the prosecution is privy to the facts, none was disclosed in any affidavit to support this application. The learned deputy public prosecutor relied entirely on the charges to convince this court that there are valid grounds for a joinder.

[37] The general rule as regards joinder of accused persons is stated in s. 170 of the Criminal Procedure Code, which says:

> (1) When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing an offence and another of abetment of or attempt to commit the same offence, they may be charged and tried together or separately as the Court thinks fit, and the provisions contained in the former part of this Chapter shall apply to all such charges.

[38] The exceptions as found in subsection (2) are for the offences of theft, extortion, criminal breach of trust, cheating or criminal misappropriation where those assisting in the commission of those offences, and abettors may be jointly tried with the principal offenders.

[39] The 'same transaction' yardstick can only be tested against the charges now facing KG and WMS. I am satisfied that those offences occurred at the same time (date) and place. (Fairlane Hotel in Kuala Lumpur). However I am not convinced that the prosecution has shown as they are now duty-bound to prove that the other criteria of unity of purpose or design and continuity of action of both the accused persons are present in the charges. KG faces two charges. Firstly, that he took part in the decision making to approve the sale of 16.8 million shares of LKTNS in SAPI for his own benefit. Secondly, he cheated the board of LKTNS by concealing PBB's offer and influenced the board to approve the sale of those shares to Briskmark. WMS faces two charges of bribing John Liaw and Michael Emban. On the face of these charges alone, I am doubtful if there is a nexus between them or that there was a unity of purpose or design in their acts.

A This court should lean in favour of this doubt and allow the accused persons the benefit of that doubt. Here I am reminded by the advice of Desai J in his judgment in *Mukerji*'s case. His Lordship said this:

> B 'I must deprecate courts' taking unnecessary risk in holding joint trials in doubtful cases. I consider it nothing short of foolishness to hold a joint trial, unless its legality is beyond dispute, & take the risk of the trial being held to be invalid by higher court'. If the higher court does not order retrial, there may arise serious miscarriage of justice from the holding of the joint trial. If it C orders retrial, though justice may be done ultimately, it would be done after a waste of public time and money and unnecessary expenditure and inconvenience to the parties. There can be no excuse for all this. 'The law is that a joint trial may be held and not that it must be held. A court is never obliged to hold a joint D trial'. Even where it can hold it, it is open to it to hold separate trials for the various offences. A prudent Judge would, therefore, always hold separate trials whenever he has the slightest doubt about the validity of a joint trial.

[40] There is another principle brought to this court's attention E by Dato' Shafee Abdullah, of counsel for KG which this court should seriously consider in deciding whether or not to exercise its discretion to order a joinder. It is this. An improper joinder of trials and charges will result in an illegality which cannot be cured. The advice of Lord Wright in *Babulal*'s case was adverted to this F court by learned counsel. His Lordship said this:

> It has been taken as settled law on all sides throughout these proceedings that the infringement of s. 239(d) would, if made out, constitute an illegality, as distinguished from an irregularity, so that the conviction would require to be quashed under the rule G stated in *Subramania Ayyar v. King-Emperor* (1) as contrasted with the result of an irregularity, as to which *Abdul Rahman v. Emperor*'s case (2) is an authority.

[41] And in *Chin Choy v. Public Prosecutor* [1955] 21 MLJ 237, H Mathew CJ in echoing that principle said that:

> In our view, there can be no doubt that the trial together of these four charges was an illegality and the trial was therefore bad. When charges are wrongly joined, the prosecutor should be asked to elect before the pleas are taken which charge or charges he I wishes to proceed on, and thus avoid a trial which is illegal and bad. As a practice, charges which are not capable of being tried together should be made on separate charge sheets and the subject of separate trials.

[42] Lastly, I need also mention that if WMS and KG were jointly tried, the prosecution needs to establish the guilt of each of the accused as a separate exercise. In exercising this discretion, I need to remind myself that both the accused persons may be subjected to a long trial complicated by the admission of evidence which may be relevant to one but not to the other. If that happened, then the court may be prejudiced by evidence that would be irrelevant if they were separately tried. The evidence against WMS and KG in the case of a joint trial would certainly be jumbled together, there may be a danger that the evidence would not be separately considered on the basis of its admissibility against each accused person, as happened in *Loh Shak Mow v. Public Prosecutor* [1987] 1 MLJ 362.

[43] All considered, I feel that it would be in the interest of justice that I disallow this application for a joinder.